

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

**JENKINS CONSTRUCTION, INC,
a Michigan Corporation,**

Plaintiff,

-v-

**THE COUNTY OF WAYNE, acting
through the ECORSE CREEK POLLUTION
ABATEMENT DRAIN NO. 1 DRAINAGE
DISTRICT, and the ECORSE CREEK
POLLUTION ABATEMENT DRAIN NO. 1
DRAINAGE DISTRICT, jointly and severally,**

Defendants,

and

**ECORSE CREEK POLLUTION ABATEMENT
DRAIN NO. 1 DRAINAGE DISTRICT,**

Counter-Plaintiff/Third-Party Plaintiff,

-v-

**JENKINS CONSTRUCTION, INC,
a Michigan Corporation,**

Counter-Defendant,

and

**THE HANOVER INSURANCE COMPANY,
A New Hampshire Company, and WADE TRIM
ASSOCIATES, INC, a Michigan Corporation,
and BRIAN E. GOMBOS, P.E., an individual,**

Third-Party Defendants,

and

WADE TRIM ASSOCIATES, INC, a

Case Nos. 14-000426-CK

Hon. Daniel P. Ryan 14-000426-CK
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CATHY M. GARRETT
/s/ Michelle Howard

Michigan Corporation,

Third-Party Counter-Plaintiff,

-v-

**JENKINS CONSTRUCTION, INC,
a Michigan Corporation,**

Third-Party Counter-Defendant.

OPINION

This case is before the Court on Jenkins Construction's Motion for Partial Summary Disposition as to ECPAD's Count III and for Summary Disposition of Wade Trim's Third-Party Counter-Complaint pursuant to MCR 2.116(C)(8) and (10). For the reasons stated below, the Court will grant in part and deny in part the motion for summary disposition.

1. Facts and Procedural History

This case arises out of the remediation of a storm water basin in Taylor, Michigan owned by the Ecorse Creek Pollution Abatement Drain No. 1 Drainage District (ECPAD). Jenkins was hired by Wayne County, acting through ECPAD, as the general contractor. Wade Trim Associates was the project's engineer. Included in Jenkins' contract with ECPAD was an indemnity provision which applied to both ECPAD and Wade Trim.

In April of 2013, shortly after completion of the remediation project, the basin overflowed, resulting in sanitary sewage pushing out the north wall of the facility and a sanitary sewage overflow onto Interstate 94 and other neighboring properties.

Jenkins initiated this action seeking funds owed under the contract with Wayne County. ECPAD was substituted for Wayne County, filed a counterclaim against Jenkins, and brought a third-party action against Hanover Insurance, Wade Trim, Brian E. Gombos, and Commerce

Controls. ECPAD alleged that the damages occurred as a result of Jenkins' performance of the work and failure to comply with its contractual obligations. Relevant to this motion is Count III of ECPAD's counter-complaint, wherein ECPAD seeks a declaratory judgment indicating that Jenkins is required to indemnify it for any claims brought against ECPAD which resulted from the overflow of the basin, including any fines assessed by the State of Michigan and any third-party claims that may be brought for property damage.

Wade Trim then filed a third-party complaint against Jenkins, seeking indemnity for the lawsuit filed against Wade Trim by ECPAD. The instant motion for summary disposition followed.

2. Standard of Review

Jenkins brings its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is tested on the pleadings alone. *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). All factual allegations must be taken as pleaded, as well as any reasonable inferences that may be drawn therefrom. *Id.* A court should grant the motion only "when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving

party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

3. Analysis

Both ECPAD and Wade Trim seek indemnification from Jenkins pursuant to Article 6.20 of the Standard General Conditions of the construction contract. The indemnification provision provides:

6.20 Indemnification

A. To the fullest extent provided by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, diseases, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

Jenkins argues that ECPAD and Wade Trim are not entitled to indemnity under this provision because the indemnity sought is for tangible property damage to the Work itself, a category of damages expressly excluded from section 6.20. Specifically, Jenkins asserts that the damages alleged arise out of damage to the basin, which constitutes the Work, and is therefore excluded from the indemnity provision. In response, ECPAD and Wade Trim argue that there was damage to the pre-existing north wall and roof system of the Basin, which were outside the scope of Jenkins’ work on the project, and that there was third-party property damaged as a result of the sewage overflow for which they may become liable

“Generally, indemnification is an equitable doctrine that shifts the entire burden of judgment from one tortfeasor who has been compelled to pay it, to another whose active negligence is the primary cause of the harm.” *St Lukes Hospital v Giertz*, 458 Mich 448, 453; 581 NW2d 665 (1998). A claim for indemnification may be premised on an express contract, an implied contract, or the common law. *Dep’t of Transportation v Christensen*, 229 Mich App 417, 425; 581 NW2d 807 (1998). This case involves an indemnification provision in an express contract. In cases involving contractual indemnity, a party’s entitlement to indemnification is determined by the terms of the contract to which the parties agreed. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 351; 686 NW2d 756 (2004).

An indemnification contract is interpreted in the same manner as other contracts. *Zahn v Kroger Co of Mich*, 483 Mich 34, 40; 764 NW2d 207 (2009). The goal of contract construction is to first determine and then enforce the parties’ intent. *Harbor Park Market, Inc, v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). When interpreting a contract, the examining court must first ascertain the intent of the parties by evaluating the language of the contract in accordance with its plain and ordinary meaning. *In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). When the contract language is clear and unambiguous, the contract must be enforced as written. *Id.*

The parties appear to agree that the indemnity provision only includes damages to tangible property that was not included in the work done by Jenkins, and this interpretation is supported by the clear and unambiguous language of the indemnification clause. There is a dispute regarding whether the pre-existing north wall and roof of the facility, which were damaged in the sewer overflow, were included in Jenkins’ work under the contract. The contract defines “Work” as follows:

Work- The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

ECPAD and Wade Trim argue that the roof and north-wall were not part of Jenkins' work under the contract. With regard to the roof, Jenkins has presented Change Order No.2, which establishes that the roof was, in fact, part of its work under the contract, including demo work, installing a concrete roof topping, and installing a roof coating. Accordingly, the Court finds that there is no genuine issue of material fact that the roof was included in the work Jenkins performed under the contract, and therefore ECPAD and Wade Trim are not entitled to indemnification for any damage caused to the roof.

With regard to the pre-existing north wall, Wade Trim has presented the affidavit of Brian Gombos, an engineer for Wade Trim. In his affidavit, Mr. Gombos indicates that "Jenkins' scope [of work] involved minimal work on the north wall of the basin." Although Wade Trim describes the work done as "minimal," it appears through Wade Trim's own admission that there is no genuine issue of material fact that the north wall was within Jenkins' scope of work. Therefore, ECPAD and Wade Trim are not entitled to indemnification for any damage done to the north wall.

Finally, ECPAD and Wade Trim seek a declaratory judgment indicating that they are entitled to indemnification for any claims of damage to property of third-parties who may, in the future, bring suit against ECPAD or Wade Trim. As indicated above, when the basin failed, sanitary sewage overflow flowed onto the neighboring property of third-parties. The indemnification provision provides that Jenkins shall indemnify ECPAD and Wade Trim "from

and against all claims, costs, losses, and damages . . . arising out of or relating to the performance of the Work, provided that such claim, costs, loss, or damage is attributable to . . . injury to or destruction of tangible property (other than the Work itself). . . .” Insofar as the potential claims involve destruction of property separate from Jenkins’ work on the basin itself, under the clear and unambiguous terms of the contract, damages to that third-party property is subject to indemnification.¹

Jenkins argues that there is no actual controversy which would allow declaratory relief to be granted because ECPAD and Wade Trim have not yet suffered any damages. The Supreme Court in *Shavers v Kelly*, 402 Mich 554, 588-589 (citations omitted), described the Declaratory Judgment Rule as follows:

The Declaratory Judgment Rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people. The existence of an “actual controversy” is a condition precedent to invocation of declaratory relief. In general, “actual controversy” exists where a declaratory judgment or decree is necessary to guide a plaintiff’s future conduct in order to preserve his legal rights. This requirement of an “actual controversy” prevents a court from deciding hypothetical issues. However, a court is not precluded from reaching issues before actual injuries or losses have occurred.

Accordingly, it is not necessary that ECPAD and Wade Trim have already suffered damages in order for the Court to issue a declaratory judgment acknowledging their right to indemnification, and Jenkins is not entitled to summary disposition on this issue.

4. Conclusion

The Court finds that ECPAD and Wade Trim are not entitled to indemnification for damage caused to the roof of the basin or the north wall because there is no genuine issue of

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The Court notes that, under the terms of the indemnification provision, ECPAD and Wade Trim would need to additionally establish that it was Jenkins’, Jenkins’ subcontractor’s, or Jenkins’ supplier’s negligence that caused the damage.

material fact that the roof and north wall were part of the work performed by Jenkins and were therefore excluded from indemnification. The Court also finds that any third-party property damages are covered under the indemnification agreement. Accordingly, the Court will grant in part and deny in part Jenkins' motion for summary disposition.

/s/ Daniel P. Ryan

Circuit Judge

DATED: 4/13/2015